83-252

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No._____

DOMINIC BARTOLATTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

RESPONSE TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

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Nos. 82-2092 and 83-252

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

CHRIS PETTI, ET AL.

v.

UNITED STATES OF AMERICA

DOMINIC PARTOLATTA, PETITIONER

v.

UNITED STATES OF AMERICA

RESPONSE TO MEMORANDUM
OF THE UNITED STATES IN OPPOSITION
TO PETITION FOR CERTIORARI

The Government incorrectly states the contention of the petitioners herein as:

> "The affidavit supporting the application for the initial interception inadequately demonstrated that other investigatory techniques were inef-

fective." (Memorandum of the United States in Opposition, page 1)

And again at page 4 of said memorandum:

> "3. Petitioners also contend (Pet. 9-11) that the affidavit failed to comply with 18 U.S.C. 2518(1)(c), arguing that insufficient facts were alleged to show that other investigative procedures could not have been successfully utilized. The court below properly rejected this claim."

The foregoing was **not** the argument of petitioners in the court below. Appellant's opening brief[1] cited the statement of the issue as being:

> **"DOES THE AFFIDAVIT IN SUPPORT OF THE ORDER OF DECEMBER 23, 1980 AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS IN THE INSTANT CASE SATISFY THE 'NECESSITY' REQUIREMENTS OF 18 USC SECTION 2518(1)(c) AND 18 USC SECTION 2518(3)(c)?"**

1. A copy of appellant's Opening Brief and Reply Brief are being lodged with the Clerk of the Court.

And in his Reply Brief (page 7), appellant Bartolatta argued:

> "Appellants herein do not complain that the affidavit should fail because the government has not exhausted **all** techniques. Appellants complain that the affidavit is devoid of facts so that

the district court judge would have a basis for determining whether it comports with the requirements of **U.S. v. Giordano**, 40 L.Ed.2d 341 (1974), **U.S. v. Kalustian**, 529 F2d 585, 588 (9th Cir. 1976), and **U.S. v. Spagnuolo, supra**."

Petitioners point out as they did in the court below that the affidavit in the instant case makes reference (page 4 thereof, paragraph c line 15):

> "Normal investigative procedures have been tried and have failed, appear unlikely to succeed if tried or too dangerous if tried. These investigative procedures will be detailed further herein."

While the foregoing paragraph tracks the language of the statute, a detailed reading of the 64 page affidavit fails to set forth the investigative procedures that were in fact employed in the instant case.

A reading of the affidavit lists "boilerplate" paragraphs describing bookmaking in general and the District Court Judge was given no information pertaining to **this bookmaking operation** but only to bookmaking in general.

The affidavit fails to indicate when the investigation commenced and merely recites the receipt by the affiant of information from various sources and files. Nothing in the affidavit indicates that these sources were contacted or caused to be contacted by the affiant in the course of this investigation or whether the sources reported routinely in the course of their roles as informants or was culled from

information already in the Government's files.

Petitioners herein do not quarrel with the statement of probable cause, but 2518(1)(c) and (3)(c) require a specific factual showing set forth in the affidavit that "wiretapping is required because normal investigative techniques were tried and failed (or were too dangerous)."

Under "need for interception", after reciting that one or more of the informants were "fearful" and would not testify in open court the affidavit states that:

> "None of the informants is able to furnish information which would fully identify all members of the ongoing criminal conspiracy. . ."

The affidavit concludes with the statement that based upon the experience of the affiant and other special agents interviews would not **normally** (emphasis added) be successful. Also recited was the affiant's meeting with the United States Attorney who advises that "based upon his experience" prosecuting criminal violations of federal law, he advised affiant that the Federal Grand Jury investigation would **probably** (emphasis added) not be successful in achieving the above mentioned goals because (a) subjects of the investigation, should they be called to testify, would **most likely** (emphasis added) invoke Fifth Amendment privileges; and (b) it would be unwise to seek Grand Jury immunity for any of the subjects named herein as it **might** (emphasis added) foreclose prosecution of the most culpable persons.

The affidavit further recites that surveillance **rarely**

(emphasis added) succeeds in gathering evidence of the criminal activities under investigation and as the Government mentions in its brief in opposition to petition for certiorari (page 6 footnote 6:)

"Even more specifically, the affidavit indicated that petitioner Petti was extremely cautious and monitored his surroundings carefully (Aff. 55)."

The affidavit merely recited the following in this regard:

> "...that he is extremely cautious and alert for law enforcement activity. He has said that he closely monitors his automobile mirrors and frequently looks out of his windows, both at home and at work, to determine if there are any suspicious persons or vehicles in the area."

It should be noted that the foregoing paragraph concerning the extreme caution of petitioner Petti was not even an observation of the investigative agency or corroborated by them but merely information from a confidential source that Petti's caution extends to monitoring his automobile mirror and looking out of his windows both at home and at work to determine whether suspicious persons or vehicles were in the area.

It is inconceivable that this minimal exercise of caution could deter the investigative and law enforcement agencies in their prescribed duty investigating criminal activity and hence require a wiretap.

The allegation by the affiant as to the need for interception contains standard boilerplate reasons to attempt to

justify issuance of the wiretap order in this bookmaking case. The affidavit does not set forth what the investigative procedures were although in the introductory paragraph (page 4 paragraph c line 15) the affiant states "these investigative procedures will be detailed further herein."

A review of the affidavit reflects the collection of telephone toll records, telephone company business records, information from informants and at best, only minimal surveillance.

A reading of the affidavit reflects that the affiant anticipated the bookmaking investigation would not be successful without the wiretap and this appears from the statements in the "need for intercept."

The affiant's lack of success in past cases and lack of probability of success in using other grand juries or other investigations is set forth but what is **not** set forth is the investigations that **were** in fact, in good faith, attempted in **this** particular case and why in **this** particular case such normal investigative techniques were not likely to succeed as is required by the statute.

The mandate against "boilerplate" affidavits was set forth in **People v. Kerrigan**, 514 F.2d 35 (1975 9th Cir.) and **United States v. Feldman**, 535 F2d 1175 (9th Cir. 1976) and although those affidavits were upheld, those affidavits set forth **some** of the factual difficulties inherent in those particular cases.

In the instant case the district court judge **could not**, from a reading of the affidavit, determine when the invest-

igation commenced, what initial steps were taken in connection with the investigation, which persons were attempted to be surveilled, how many attempts at surveillance were made over what period of time, or **how long** any one surveillance was continued.

It is apparent that in gambling cases, a wiretap makes the case and that agents, knowing this, spend more time in preparation of the affidavit setting forth why **normal** investigations **do not** succeed than in conducting the investigation itself.

While it is true as the Government has alleged that "every investigative technique need **not** be employed," clearly there is a requirement that **some** "normal" investigation be conducted and the results thereof set forth so that the magistrate (district court judge) can determine for himself that, as the court said in **United States v. Spagnuolo**, 549 F2d 705, (at page 710):

> "What is required is a showing that in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time."
>
> "Any such showing requires setting forth an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine, **independently of an agent's assertions with respect to his or other agents' experiences,**

that ordinary investigative techniques will very likely not succeed or that their use will impair a life or in some other specific way be too dangerous." (Emphasis added.)

And at page 710:

"It is no doubt true that experienced agents at the outset of an investigation can anticipate with a fair degree of accuracy whether ordinary techniques will fail or prove to be 'too dangerous'. To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents as a waste of time and resources. Their perception may be accurate, but Congress has deprived it of decisive influence. The particularized showing here described is necessary. A district judge, not the agents, must determine whether the command of Congress has been obeyed."

What is in issue here is whether or not this court will insist that 2518(1)(c), (3)(c) are to be followed or whether the Government will be permitted to secure a wiretap on a minimal investigation without any detailed showing of the extent of the investigation attempted or employed, and with a recitation of their past experience in investigations of this kind without any showing of how the operation being conducted herein, is different from ordinary book-

making cases that do not and would not lend themselves to normal investigations.

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

ARTHUR LEWIS
Attorney for Petitioner,
DOMINIC BARTOLATTA

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On October 6, 1983, I served the within RESPONSE TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk of the Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, California 90012

OSCAR GOODMAN
520 S. Fourth St.
Las Vegas, Nevada 89101

REX LEE
Solicitor General of the United States
Department of Justice
Room 5143
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 6, 1983, at Riverside, California.

JACK GALLAGHER